Office of Administrative Law Judges

MEMORANDUM DATE: December 11, 2007

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT:U.S. DEPARTMENT OF THE NAVY

NAVAL AIR DEPOT
JACKSONVILLE, FLORIDA
Respondent

AND Case No.: AT-CA-06-0432

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1943, AFL-CIO
Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

U.S. DEPARTMENT OF THE NAVY
NAVAL AIR DEPOT
JACKSONVILLE, FLORIDA
Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1943, AFL-CIO
Charging Party

Case No. AT-CA-06-0432

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JANUARY 14, 2008**, and addressed to:

Office of Case Control

Federal Labor Relations Authority

1400 K Street, NW, 2nd Floor

Washington, DC 20005

SUSAN E. JELEN

Administrative Law Judge

Dated: December 11, 2007

Washington, DC

OALJ 08-05

U.S. DEPARTMENT OF THE NAVY

NAVAL AIR DEPOT

JACKSONVILLE, FLORIDA

Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 1943, AFL-CIO

Charging Party

Case No: AT-CA-06-0432

Gary Stokes, Esquire
For the General Counsel
Cheri Alsobrook
For the Respondent
Arlen Bowen
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, et seq. (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Part 2423.

On September 1, 2006 [1/], the American Federation of Government Employees, Local 1943, AFL-CIO (Union) filed an unfair labor practice charge (G.C. Ex. 1(a)) against the U.S. Department of the Navy, Naval Air Depot, Jacksonville, Florida (Respondent). On June 27, 2007, the Regional Director of the Chicago Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (G.C. Ex. 1(c)) in which it was alleged that the Respondent committed unfair labor practices in violation of §7116(a)(1)(5) and (8) of the Statute by failing and refusing to provide the Union with key words that were used for screening applicants for the GS-0801-14 General Engineer position. The Respondent filed a timely Answer (G.C. Ex. 1(d)) in which it admitted certain allegations while denying the substantive allegations of the complaint. At the hearing, the Respondent made a motion in which it admitted to the allegations set forth in paragraphs 9 and 10 of the complaint. This motion was granted. (Tr. 6-7)

A hearing was held in Jacksonville, Florida on September 12, 2007, at which all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. [2/] Both the Respondent and the General Counsel filed timely post-hearing briefs, which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Respondent is an agency within the meaning of 5 U.S.C. §7103(a)(3). The Union is a labor organization within the meaning of 5 U.S.C. §7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Exs. 1(c) and 1(d))

This matter concerns the selection process for a non-bargaining unit position at the Naval Air Depot in Jacksonville, Florida. The Respondent uses an automated web-based job application and applicant screening system whereby employees upload electronic versions of their resumes to be considered for vacancies as they become available. (G.C. Exs. 2, 3 and 6; Tr. 36-39) The system is presently called Civilian Hiring and Recruitment Tool (CHART), and was formerly called Standard Automated Inventory and Referral System (STAIRS). (Jt. Ex. 3; G.C. Ex. 2; Tr. 31) The Navy uses this CHART system nationwide. (G.C. Exs. 2 and 5; Tr. 31)

The CHART system, which uses a commercial product called Resumix, allows the Respondent to search the collected pool of electronic resumes by key words to determine eligibility for vacancies. (G.C. Exs. 2, 3 and 6; Jt. Ex. 4) The selecting official for a vacancy provides a list of desired skills for the position to the recruiter at the Human Resources Service Center Southeast (HRSC-SE) for the purpose of generating the key words that are used to electronically search the resumes posted on the system for potential candidates. (G.C. Ex. 3, pp. 8-10; Jt. Ex. 4; Tr. 93-94) The selecting official works with the HRSC-SE recruiter to develop the key words about 99% of the time. (Tr. 93-94) A key word search of the CHART system generates a certificate of eligibles, otherwise known as a best qualified list, from which interviews and selections are made. (Jt. Exs. 3 and 4; G.C. Ex. 6; Tr. 18)

The CHART system defines key skills as those hard, *i.e.* technical, skills that are desired for high-level job performance. A required skill is a key skill which has more weight than other key skills. A required skill can be used to distinguish among a large number of candidates possessing key skills. Key skills are usually readily identifiable as being essential to job performance; they are job-related and based on the position description. (Jt. Ex. 5) A hard skill is defined as a technical skill that is identified by the experience, training and education of the applicant. Examples of hard skills include repair of DFM-56 aircraft engine, design database, repair heating/AC system, manage software development, process purchase orders, administer LAN, project management, quality control, acquisition, briefings/presentations, write inspection reports. A soft skill is defined as an interpersonal or other type of non-technical skill that is difficult to assess through experience, training and education. Examples of soft skills include oral/written communication, team player, self starter, self motivated, working effectively with others, analytical ability, briefings/presentations. (Jt. Exs. 4 and 5)

In May, the Respondent issued a request for personnel action to recruit for a GS-0801-14 General Engineer. (Jt. Ex. 1) This position was filled by an Open

1. / All dates occur in 2006 unless otherwise stated.

2. / Pursuant to a *subpoena duces tecum* from the General Counsel, the Respondent furnished the key word list for my *in camera* review. The General Counsel had no objection to my review of the key word list and other relevant documents as *in camera* documents, asserting that a decision could be made in this matter without the actual documents. I reviewed the documents, discussed with the parties, and include them with the transcript and exhibits in this matter.

Continuous Announcement for General Engineer, which covers a wide-range of General Engineer positions at various locations throughout the country. The Announcement states, in part,:

> The Department of the Navy recruits talented people for a variety of occupations and grade levels throughout the world. We anticipate numerous vacancies for this position and we will maintain an inventory of high-caliber applicants to be referred when a vacancy occurs. When you apply under this announcement, your application will be placed in our candidate inventory and considered as vacancies become available. Because this announcement may be used to fill vacancies at various grade/pay levels and locations, be sure you clearly state your skills, all acceptable grade/pay level, and desired job locations when you apply. (Jt. Ex. 2) Thus, employees do not apply for specific vacancy announcements, but have one resume that can be considered as the Respondent recruits for specific positions. (Jt. Ex. 2) The GS-14 General Engineer position that was actually filled was the P-3 Team Lead position, which is a non-bargaining unit position. (Jt. Ex. 1; Tr. 63-64) [3/]

On June 29, the Respondent generated a Certificate of Eligibles for the GS-0801-14 P-3 Team Lead position by searching the pool of electronic resumes through the use of key words. (Jt. Ex. 1; Tr. 93-95) Twenty-five individuals were identified as candidates with the skills for the position and placed on the Certificate of Eligibles. (Jt. Ex. 1) The Respondent uses a Selection Advisory Board to rate and rank employees on the Certificate and then interview the top candi-dates for this position. Two candidates were interviewed, with Jerry Deans being selected for the vacancy. (Jt. Ex. 1)

Sometime during this process, three GS-13 bargaining unit employees contacted the Union questioning why they did not make the Certificate of Eligibles for the GS-14 position. (Tr. 65-67)

On Wednesday, July 5, Arlen Bowen, the Acting President of AFGE Local 1943, sent an email request for information under section 7114(b)(4) of the Statute to Linda Anderson, the Executive Assistant to the Commanding Officer of the Naval Air Depot. (G.C. Ex. 11; Tr. 67) The request referenced three bargaining unit employees and questioned why qualified individuals were left off the P-3 Team Lead certification. The Union's request covered several items of information, and specifically, at issue in this matter, information ". . . concerning the key words (hard and/or soft skills) that were used for screening applicants for eligibility."

The Union's request for information also included its statement of particularized need:

> The Union's information request is for it to meet its obligation to provide representation, the interest in a fairly run merit promotion system (avoidance of prohibited personnel practices, avoidance of violation of the Labor Management Statute, or avoidance of Title VII – EEO infractions) and encouragement of a non-disruptive grievance or complaint system(s). The Union needs this information to determine if the Research and Engineering Competency (Code 4.0.) and (4.1) (P-3 Team Lead Position) is being accomplished in a covert manner such that employees were left off the cert. . . .(G.C. Ex. 11)

On July 7, the Respondent, through Margaret H. Davis, Labor Relations Specialist, Human Resources Office, responded to the Union's request for information. Certain documents were furnished in response to the request for information, including the SF-52 Request for Personnel Action; Selection Recommendation form; Selection Advisory Board (SAB) checklist; Internal Certificate (both Competitive and Non-competitive candidates; SAB member appointment letter; SAB procedures; Position Description for the P-3 Fleet Support Team Lead

GS-0801-14 General Engineer; criteria for rating resumes; interview evaluations and rating criteria; SAB scoring sheets; and resumes of employees who were interviewed. (Jt. Ex. 1) [4/] Davis further informed the Union:

> You also requested information concerning the key words (hard and soft skills) that were used for screening applicants for eligibility. This information is considered to be part of the crediting plan and as such is not releasable. (Jt. Ex. 1)

There is no further written communication between the parties with regard to the Union's request for the key words. Bowen asserts that he telephoned Davis and asked her whether there was anything the

3. / The P-3 is a large propeller driven aircraft used in anti-submarine warfare. The GS-0801 series General Engineers work on at least six types of aircraft, including the P-3, at the Naval Air Station. (Tr. 64-65)

4. / Jt. Ex. 1 was initially misidentified in the documents, but has been corrected to reflect the appropriate number.

Union could do in order to get the key words. (Tr. 69) Davis simply replied that the key words were not releasable. (Tr. 70) Davis was unable to recall any such telephone conversation with Bowen and indicated she usually made notes regarding such a conversation. She did testify that there was a possibility of such a conversation. (Tr. 103, 108)

Bowen further testified that he then called Anderson, again requesting the key words and asking if the Union needed to do anything further. (Tr. 70, 88) Anderson told Bowen that it was the Agency's policy that the key words were not releasable because they were considered to be part of the crediting plan. (Tr. 70, 88) Bowen told Anderson the Union needed the key words to support a grievance. (Tr. 88) Bowen also told Anderson that he would be forced to file an unfair labor practice charge and Anderson encouraged him to do so in order to resolve the issue of whether the key words are releasable. (Tr. 70, 71) [5/]

A Union-initiated grievance was filed with the Respondent on July 11, asserting that a number of qualified engineers were left off the Certificate of Eligibles for the GS-0801-14 P-3 Team Lead position. (G.C. Ex. 12) The Respondent denied the grievance on September 18. (G.C. Ex. 13) Bowen testified that the key words were requested to support the grievance, and that the Union has never received the key words. (Tr. 75-76)

Issues

Whether the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to comply with section 7114(b)(4) by failing to provide the Union with the key words (hard and soft skills) used for screening applicants for the GS-0801-14 General Engineer position.

Positions of the Parties

General Counsel

The General Counsel (G.C.) contends that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to provide the Union with the key words used in the selection of the GS-0801-14 General Engineer position. The G.C. contends that the Union has established its particu-larized need for the key words, in its original July 5 email to Linda Anderson requesting information under the Statute and in the Acting President's subsequent oral conversations.

Three bargaining unit employees had complained to the Union that they were left off the Certificate of Eligibles and the Union asserted that it needed the requested information in order to support a possible grievance. (G.C. Ex. 11; Tr. 70-71, 88-89). The G.C. noted that the Authority has found particularized need established where, for example, the union stated that it was requesting information to determine if complaints by employees about a current policy are true and correct and to represent employees "in any rightful charges against the [a]gency." *United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas*, 51 FLRA 768, 774-76 (1996); *United States Department of the Army, Army Corps of Engineers, Portland District, Portland, Oregon*, 60 FLRA 413, 415 (2004)(*Army Corps Portland*).

The G.C. asserts that the only countervailing anti-disclosure interest conveyed to the Union by the Respondent at the time of the Union's Statutory information request was that the key words were considered to be part of a crediting plan, and as such, were not releasable. (Jt. Ex. 1; Tr. 69-72) The G.C. first argues that the key words were not part of a crediting plan. The G.C. asserts that crediting plans involve the ranking of applicants and assigning points to the various job elements that are reviewed and the key words do not accomplish this goal. However, even if the key words were part of a crediting plan, the G.C. argues they should be released, noting that there is no *per se* rule that such information is never releasable to a Union pursuant to a section 7114(b)(4) request. *Federal Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania*, 51 FLRA 650, 654-56 (1995) (*Allenwood FPC*) (holding that the Union did not articulate a particularized need for a crediting plan.)

With regard to the Respondent's assertion that the key words need to be kept confidential, this is primarily an assertion that the Union cannot be trusted to keep the key words secret. However, as the United States Court of Appeals for the District of Columbia Circuit stated, "[t]his argument amounts to nothing more than the [agency's] doubt that union representatives can keep confidential matters confidential. Union representatives are often in the position of having to maintain confidentiality." *Department of the Air Force, 436th Airlift Wing, Dover Air Force Base v. FLRA*, 316 F.3d 280,

5. / I credit Bowen's testimony that he verbally discussed the Union's request for information with both Davis and Anderson. Anderson did not testify at the hearing and Davis conceded the possibility of such a conversation with Bowen. There is no evidence, however, that during these telephone conversations, Bowen either gave any further explanation of the Union's need for the requested information or that the Respondent requested any further explanation.

287 (D.C. Cir. 2003) Significantly, the Respondent never explored with the Union at the time of the Union's request limited disclosure of the key words, and there is no indication that the Union would disseminate the key words throughout the bargaining unit. The Respondent is precluded from now arguing that the Union cannot be trusted to keep the key words secret. *Army Corps Portland*, 60 FLRA at 415.

Finally, the G.C. asserts that certain of the Respondent's defenses, specifically that there was no duty to furnish information since the position at issue was a non-bargaining unit position (Tr. 24) and also that it provided sufficient information to the Union (Tr. 24), cannot be considered since such anti-disclosure interests were not raised at the time of the Union's information request. Citing *Federal Aviation Administration*, 55 FLRA 254, 260 (1999) (*FAA*), the G.C. maintains an agency may not raise anti-disclosure interests at the hearing that were not raised at the time it responded to a data request.

In conclusion, the G.C. asserts that the Union's demonstrated particularized need for the key words outweighs the Respondent's stated interest in nondisclosure of the key words. Therefore, the Union was entitled to the requested key words and the Respondent violated the Statute by refusing to provide them as requested.

Respondent

The Respondent denies that it violated the Statute as alleged and maintains that the Union failed to establish a particularized need for the requested key words. In that regard, at the hearing, the Union Acting President testified that the Union intended to use the information to help the Union determine if sufficient grounds existed to file a grievance regarding the way the selection process was conducted. (Tr. 75-75) However, the parties' negotiated grievance procedure is not applicable to a process used to fill a non-bargaining unit position. Since the Respondent at no time consented to negotiate the process used to fill non-bargaining unit positions, the issue that the Union seeks to pursue via the negotiated grievance procedure is in fact a non-grievable issue under the parties' collective bargaining agreement. [6/]

If the Union did establish a particularized need for the requested information, the Respondent affirmatively asserts that its privacy interests outweigh the Union's need for the information. The Respondent asserts that it has an overriding interest in preserving the confidentiality of the key word list, which is part of the crediting plan to identify an applicant's hard and soft skills. The Respondent asserts that it reasonably expects to re-use the key word list for future vacancies. The misuse of the key words would provide an unfair advantage to applicants who obtained access to it, and this would undermine the usefulness and validity of the Respondent's crediting plan. Under these circumstances, the Respondent asserts that its countervailing interest in maintaining the confidentiality of this information outweighs the Union's need for its disclosure.

The Respondent also presents alternative defenses to the allegation that it failed to comply with section 7114(b)(4) of the Statute by failing to provide the Union with the key words used for screening applicants for the GS-0801-14 General Engineer position.

The Respondent first argues that the Union has no legal entitlement to the data since the position at issue in this matter was a non-bargaining unit position. The body of Authority case law establishes that the selection and selection procedures for non-bargaining unit positions are outside of the Agency's duty to bargain, and are negotiable only at the election of the Agency. In this case, the Respondent has elected not to negotiate with the Union regarding these topics. The information sought by the Union is, therefore, not a collective bargaining subject encompassed within the requirements of 7114(b)(4) and the Respondent has not violated the Statute by declining to provide the list of key words in response to the 7114(b)(4) request submitted by the Union.

The Respondent next asserts that the Union's request was not specific enough to support release of the Respondent's crediting plan. See *Allenwood FPC*, 49 at 602 (Union's request was not specific enough to allow the agency to make a reasoned judgment as to whether disclosure of the plan was necessary.) The Respondent asserts that the Union's request (G.C. Ex. 11) lacked the specificity necessary for the agency to determine that disclosure of the key word list used in its crediting plan was necessary. The Union's information request failed to specifically address why the key word list was necessary for the Union's inquiry, or how possession of that information would enhance the Union's ability to investigate its concerns in a manner that could not be accomplished with the information that the Respondent did provide the Union.

The Respondent then argues that it has fulfilled its Statutory obligation regarding the production of information. In response to the Union's request for information, the Respondent provided the Union with 105 pages

6. / The parties' collective bargaining agreement was not placed into the record during the hearing.

of documentation regarding the selection process at issue. (Jt. Ex. 1) The Respondent asserts that the Union's particularized need justifies release of some, but not all of the information requested. The Respondent's reason for omitting the key word list was explained to the Union in writing, at the time of the Respondent's response. (Jt. Ex. 1, page 2). This omission did nothing to hinder the Union's investigation into the fairness and equity of the selection process; further, key word lists are developed from the position description, which was furnished to the Union. Therefore, the list of key words does not add to the information already provided to the Union.

Analysis

Section 7114(b)(4) of the Statute provides

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation -
>
> . . .
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data-
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]

In its answer to the complaint in this case, the Respondent denied that the information requested by the Union satisfied any of the criteria for disclosure specified in section 7114(b)(4). The Respondent later amended its answer to admit that the information in question was normally maintained by the Respondent in the regular course of business and is reasonably available. The Respondent has not made any claim or presented any argument that the information in question constitutes guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. Under these circumstances, I will not address these requirements. The only issue raised by the Respondent relates to the requirement of whether the information is "necessary".

In *Internal Revenue Service, Kansas City*, 50 FLRA at 669-70 (1995) (*IRS, Kansas City*), the Authority set forth the analysis for determining whether information is "necessary" under § 7114(b)(4) of the Statute. To demonstrate that information is "necessary", a union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute." *Id.* (footnote omitted). See also *American Federation of Government Employees, Local 2343 v. FLRA*, 144 F.3d 85, 89 (D.C. Cir. 1998) (*AFGE*, *Local 2343*); *United States Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania. v. FLRA et al.*, 988 F.2d 1267, 1270-71 (D.C. Cir. 1993) (*DOJ*).

The union's responsibility for articulating its interests in the requested information requires more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the disclosure of the information is required under the Statute. *IRS, Kansas City*, 50 FLRA at 670. *See also AFGE, Local 2343*, 144 F.3d at 89 ("The articulation requirement gives content to the 'particularized' part of the test by requiring not just that there be a need - a standard that unions probably could meet whenever seeking information in connection with a grievance - but also that unions explain with some specificity why they need the information."). A union must articulate its interests in disclosure of the information at or near the time of the request -- not for the first time at an unfair labor practice hearing. *See, e.g., U.S. Department of Treasury, Internal Revenue Service, Washington, D.C. and U.S. Department of Treasury, Internal Revenue Service, Oklahoma City District, Oklahoma City, Oklahoma,* 51 FLRA 1391, 1396 (1996).

The agency is responsible for establishing any countervailing anti-disclosure interests and, like the union, must do so in more than a conclusory way. *Id. See also Health Care Financing Administration*, 56 FLRA 156, 159 (2000) (*HCFA I*). Such interests must be raised at or near the time of the union's request. *United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas*, 57 FLRA 808, 812 (2002) (*FCI*).

In its July 5 request for information, the Union first stated that it was seeking information why several qualified individuals were left off the P-3 Team Lead certification, and named three affected bargaining unit employees. The Union then set forth its particularized need for the requested information, including the key

words at issue in this matter. Specifically, the Union stated that the information request was to enable the Union "to meet its obligation to provide representation, the interest in a fairly run merit promotion system . . . and encouragement of a non-disruptive grievance or complaint system(s)." The Union raised concerns of whether the selection process had been performed in such a manner that employees were left off the certification, and noted that management had been informed that certain P-3 employees were not on the certification and had been requested to hold the certification in abeyance until an investigation could be conducted. (G.C. Ex. 11)

The evidence clearly reflects that only employees who are on the certification can be considered for the specific vacancy at issue, in this case, the P-3 Team Lead position. And the key words, as established by the Respondent, are used to review the many resumes to determine the certification. The Union clearly expressed its need for the key words, noting the concerns of employees that they were qualified for the position at issue but had been left off the certification, as well as the Union's obligation to provide representation for such employees. The Union set forth the reasons why it needed the key words, the uses to which it would put the key words, and the nexus between those uses and the Union's representational responsibilities. Further, the Union's request was sufficient to permit the Respondent to make an informed response. Therefore, I find that the Union clearly articulated its particularized need for the requested information at issue, *i.e.*, the key words, and such information was necessary, within the meaning of section 7114(b)(4) of the Statute, for the Union to perform its representational responsibilities under the Statute. *See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Region X, Seattle, Washington*, 39 FLRA 298 (1991) (*HHS, SSA*) (Agency violated the Statute by refusing to provide the Union with all documents pertaining to the filling of a vacancy for the purpose of investigating whether there were grounds for filing grievances on behalf of two bargaining unit employees who were rated ineligible for the vacant position.); *HCFA I*, 56 FLRA 156 (Agency violated the Statute by refusing to provide the Union with certain information concerning the selection process used to fill a job vacancy for a bargaining unit position); *Health Care Financing Administration*, 56 FLRA 503 (2000) (HCFA II) (Agency violated the Statute by refusing to provide the Union with certain information concerning the selection process used to fill two job vacancies for bargaining unit positions.) [7/]

I further note that the Respondent never questioned the Union's reasons for requesting the information related to the filling of the vacancy, including the key words, or indicated in any way that the Union had not met the particularized need standard required by the Authority. In fact, as noted above, the Respondent furnished a great deal of information to the Union in its July 7 response. Further, in conversations following the information request and the response, the Union's Acting President asked Agency representatives if there was any additional information or explanation that the Union could furnish, and which the Respondent declined, asserting only that the information was part of the Agency's crediting plan.

As stated above, in its response to the Union's request for information, the Respondent furnished most documents but denied the Union's request for the key words, stating that the key words could not be furnished as they were considered part of the Respondent's crediting plan. The Respondent asserts that it has a strong interest in maintaining the confidentiality of its crediting plan. [8/] The Respondent asserts that the key words are part of the Agency's crediting plan to identify an applicant's hard and soft skills. The Respondent asserts that it does reuse crediting plans and reasonably anticipates using the key word list at issue for future vacancies. [9/]

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7. / The Respondent asserted that both HCFA I and HCFA II cases were inapposite since they involved the selection process for filling bargaining unit positions, while in this matter, the selection was for a non-bargaining unit position. However, as the Authority has previously found that an agency is required to furnish information concerning non-bargaining unit positions when the information is necessary for the union to effectively fulfill its representational responsibilities, *see HHS, SSA, supra; U.S. Department of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Center, McClellan Air Force Base, California,* 37 FLRA 987, 995 (1990), I reject the Respondent's contention and find these cases relevant to this matter.

8. / The Respondent also argues that the key words were developed from the position description of the vacant position at issue. (Tr. 98) Since the Respondent provided the position description for the GS-14 General Engineer to the Union, the specific key words themselves would not add to the information already provided to the Union. This argument, however, is not reasonable and is rejected. While the Union may have access to the entire position description (which is six pages, not including the cover page) (Jt. Ex. 1), such access could not reasonably be concluded to allow the Union to determine what 5 or 6 words constituted the actual key words. With this argument, the Respondent does little more than tell the Union that it should just guess what the key words were. This is not an acceptable response to a legitimate request for information under section 7114(b)(4) of the Statute.

9. / The Respondent did not present any specific evidence that it has ever re-used key words in similar vacancies. Rather, the evidence indicates that key words are created for each particular vacancy.

The Respondent primarily asserts that it is concerned that advanced knowledge of this information would allow and induce at least some applicants to embellish or fabricate their backgrounds to suit the appropriate key words. This would undermine the usefulness and validity of the Agency's crediting plan. The Respondent's primary concerns were that Jim Dixon, the Union President, and Arlen Bowen, the Acting Union President during this time frame and the Union Chief Steward, were engineers who had active resumes in the CHART Resumix system and who planned to compete for future vacancies. The Respondent raised concerns that both individuals were in the position to personally benefit by gaining an unfair advantage over competing applicants due to their potential access to the key words.

The evidence, however, does not reflect that the Respondent ever raised this concern over misuse of the key words to the Union at any time during the processing of the information request. The Respondent framed its refusal to furnish the key words in terms of the crediting plan, but made no effort to discuss its concerns regarding the need for confidentiality. Further, there was no evidence that the Union has ever misused information received from the Respondent or disseminated such information throughout the bargaining unit or to specific individuals within the bargaining unit. There is no evidence that the Union would not keep confidential matters confidential.

Therefore, the evidence fails to reflect that release of the key words would create an unfair advantage or compromise the selection process. *Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina*, 26 FLRA 407, 413-414 (1987) (*Fort Bragg*) [10/] Under these circumstances, the Respondent has failed to establish any countervailing anti-disclosure interests that outweigh the Union's particularized need. [11/]

The Respondent also presented several alternative defenses to the allegation that it failed to comply with section 7114(b)(4): that the Union had no legal entitlement to the data since the position at issue was a non-bargaining unit position; that the Union's request was not specific enough to support release of the Respondent's crediting plan; and that the Respondent had fulfilled its Statutory obligation regarding the production of information, noting the volume of information actually furnished to the Union in response to the request for information.

Before these defenses can be dealt with on the merits, the matter of the Respondent's timing in raising these particular objections to the Union's information request must be addressed. The Authority has held that an agency is responsible for raising, at or near the time of the union's data request, any countervailing anti-disclosure interest. *E.g., United States Department of Justice, Immigration and Naturalization Service, Western Regional Office, Labor Management Relations, Laguna Niguel, California, et al.*, 58 FLRA 656, 659 (2003) (*INS, Laguna Niguel*). Here, there is no evidence the Respondent communicated to the Union any claim that the Union was not entitled to the requested information because the position at issue concerned a non-bargaining unit position, until the defense was raised at the hearing. Further, there is no evidence that the Respondent raised any concerns regarding the specificity of the Union's request for information at the time of the Union's data request. Finally, the Respondent never raised its defense that it had fulfilled its statutory obligation by producing all of the requested information, with the exception of the key words, until the hearing in this

10. / In *Fort Bragg,* the Authority found that the Respondent violated the Statute by failing to provide the Union with the crediting plan for a specific vacancy. "In the cases under consideration, we find that disclosure of the requested data would not create an unfair advantage to some candidates or compromise the utility of the Agency's selection process and, therefore, disclosure would not be contrary to the requirements of the FPM. The requests are limited to two specific selection actions and do not require the blanket disclosure of all agency crediting plans. *Compare Department of Treasury, U.S. Customs Service*, 23 FLRA No. 91. The crediting plans in these cases will be subject to limited disclosure to the Union to fulfill its representational duties. We believe that disclosure under these circumstances will not result in an unfair advantage to prospective candidates (the subject selection actions have been substantially completed) and that disclosure will not destroy the integrity of the Agency's selection process. As the Judge noted, unit employees, who may be Union members, have sat on the rating panel and have had access to the crediting plan; and there was no evidence that in the past the Union had disseminated the information so as to prejudice the selection process. We therefore find that the release of the data requested is not prohibited by law and is not inconsistent with the FPM."

11. / Even though the G.C. asserts that the key words should not be considered as part of the Respondent's crediting plan for the particular position at issue, it appears to me that the key words in this matter are a smaller subset of the "required and desired skills which are necessary for successful job performance"; the definition of crediting plan utilized by the Respondent. (G.C. Ex. 3, p. 12) This seems consistent with the definition of crediting plans in prior cases, for instance, "'crediting plans' are documents developed by an employer to rate and rank candidates for a specific position. A crediting plan typically consists of a list of criteria reflecting the knowledge, skills, and other characteristics deemed necessary for a particular job, as well as devices used to measure whether a candidate satisfies those criteria." *DOJ*, 988 F.2d 1267, 1268 (D.C. Cir. 1993). Nevertheless, whether the key skills are or are not a part of the crediting plan, I have found that the Union established a particularized need for this requested information, as required by the Statute. *See HCFA II*, 56 at 506-07; *Allenwood FPC,* 51 FLRA at 654-56 (holding that the Union did not articulate a particularized need for a crediting plan).

matter. Therefore, I find the Respondent failed to raise these defenses for denying the request for data in a timely manner and will not consider them now. [12] / *See id.*

In conclusion, I find that the Union established a particularized need for the requested information, specifically the key words, and that the Respondent failed to demonstrate any countervailing, anti-disclosure interests that outweighed this particularized need. Consequently, I find that the Respondent failed to comply with section 7114(b)(4) of the Statute and violated section 7116(a)(1), (5) and (8) of the Statute by refusing to furnish to the Union the key words used in screening applicants for the GS-0801-14 General Engineer position.

It is therefore recommended that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(e) of Rules and Regulations of the Authority and section 7118 of the Federal Service Labor-Management Regulations Statute (Statute), it is hereby ordered that the U.S. Department of the Navy, Naval Air Depot, Jacksonville, Florida, shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, Local 1943, AFL-CIO (the Union), the exclusive representative of bargaining unit employees, with the key words used to electronically screen applicants' electronic resumes for eligibility for the GS-0801-14 P-3 Team Lead General Engineer position that was filled on or about June 29, 2006, as requested by the Union on July 5, 2006.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide the Union with the key words used to electronically screen applicants' electronic resumes for eligibility for the GS-0801-14 P-3 Team Lead General Engineer position that was filled on or about June 29, 2006, as requested by the Union on July 5, 2006.

(b) Post at its facilities where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Naval Air Depot, Jacksonville, Florida and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, December 11, 2007

SUSAN E. JELEN

Administrative Law Judge

12. / Interestingly, the Respondent makes no attempt to explain why it furnished the extensive information that it did furnish to the Union if it believed that the Union was not entitled to information because the position at issue was a non-bargaining unit position or because of its concerns regarding the specificity of the request.